

Decision mailed: 1/8/10  
Civil Service Commission  
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**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

**One Ashburton Place - Room 503  
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**LISA TOMASHPOL,**  
Appellant

v.

**CHELSEA SOLDIERS HOME,**  
Respondents

**CASE NO: D1-09-188**

Appellant's Attorney:

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Commissioner:

Paul M. Stein

**DECISION ON MOTIONS FOR SUMMARY DECISION**

The Appellant, Lisa Tomashpol, acting pursuant to G.L.c.31, §43, duly appealed to the Civil Service Commission (Commission) following her layoff from the position of Typist II for lack of funds, protesting a decision of the Chelsea Soldiers Home (CSH), the Appointing Authority, to deny her "bumping rights" into another civil service position (Clerk I or Clerk II) within her departmental unit following the layoff. The parties filed a joint Stipulated Record and each party filed a Motion for Summary Decision. Oral argument was held on the motions at a hearing in the Commission's offices on July 28, 2009. a hearing on the motions at the Commission's office. The hearing was digitally recorded.

### FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and inferences reasonably drawn, the following material facts are undisputed:

1. The Appellant, Lisa Tomashpol, holds the permanent full-time civil service position of Typist II at the CSH, with an original employment date of 4/19/1987 and permanency in the Typist II position as of 12/30/1999. (*Stipulated Record*, ¶1; *CSH Seniority Report*)

2. In the Spring of 2009, due to the statewide-mandated “9C” budget cuts, it became necessary for the CSH to initiate cost-cutting initiatives that included, among other things, the elimination of all three positions of Typist II and both positions of EDP Entry Operator II at CHS. (*Stipulated Record*, ¶4 & ¶5; *CSH Seniority Report*)

3. On March 23, 2009, the CHS informed Ms. Tomashpol that, due to the lack of money, her position, along with the other two Typist II positions at CHS, were eliminated. (*Stipulated Record*, ¶6)

4. At all time relevant to this controversy, the CSH employed no personnel in the position of Typist I. (*Stipulated Record*, ¶4 & ¶5; *CSH Seniority Report*)

5. At all times relevant to this controversy, the CSH did employ, and continues to employ: (a) one full-time civil service employee in the position of Clerk II, with a civil service permanency date of 6/3/2001; and (b) a part-time provisional civil service employee in the position of Clerk I. (*Stipulated Record*, ¶8; *CSH Seniority Report*)

6. The Typist II position is a Job Grade 11; the Clerk II is a Job Grade 8; and the Clerk I position is a Job Grade 6 All three positions are classified in the official service. (*Stipulated Record*, ¶3 & ¶10; *CSH Seniority Report*)

7. Upon notification of her impending layoff, Ms. Tomashpol asserted a claim to “bumping rights”, i.e., to be demoted either to the position of Clerk II or Clerk I then held by an employee with less seniority than she had. The CHS denied this request and Ms. Tomashpol was laid off effective April 3, 2009. This appeal duly ensued. (*Stipulated Record*, ¶8; *Claim of Appeal*; *Appellant’s Memorandum*,p.2)

8. The Classification Specifications for the Typist Series (containing two job titles of entry-level clerical job title of Typist I and second-level clerical job title of Typist II), and the Clerk Series (containing six levels from entry level clerical job title of Clerk I through third- or fourth-level supervisory job title of Clerk VI) fall within the same Occupational Group (15) and were last updated in 1987. (*Stipulated Record*, *Exhibits 1 & 2*)

9. The Classification Specification for the Typist Series contains the following summary of that series of job titles

Incumbents of positions in this series type correspondence, reports and other material; proofread typewritten material; maintain files and records; answer telephones; prepare and mail outgoing correspondence or parcels; prepare correspondence, forms, files and reports for processing, storage or forwarding; answer inquiries, operate standard office machines and equipment; and perform related work as required.

The basis purpose of this work is to provide typing and other clerical support for an assigned unit or agency.

(*Stipulated Record*, *Exhibit 1*)

10. The Classification Specification for the Clerk Series contains the following summary of that series of job titles:

Incumbents of positions in this series maintain files and records; answer telephones; prepare and mail outgoing correspondence or parcels; prepare correspondence, forms, files and reports for processing, storage or forwarding; answer inquiries, operate standard office machines and equipment; and perform related work as required.

The basis purpose of this work is to provide clerical support for an assigned unit or agency.

(*Stipulated Record*, *Exhibit 2*)



11. The Classification Specifications for the Typist and Clerk Series also contains the following summary of the common duties of each job title:

TYPIST SERIES	CLERK SERIES
EXAMPLES OF DUTIES COMMON TO ALL LEVELS IN SERIES	
Types material such as correspondence, narrative reports, memoranda, minutes of meeting, forms, lists, and/or stencils from rough draft or straight copy according to standard agency format.	Based on assignment...may...[p]erform typing functions in which speed is not essential, such as typing forms, routine correspondence, envelopes, labels,
Checks the accuracy of typewritten material by proofreading to ensure conformance with original data.	
Files material such as correspondence, reports, applications, claim record cards, etc. in accordance with a prescribed classification system.	Files material such as correspondence, reports, applications, claim record cards, etc. in accordance with a prescribed classification system.
Answers telephone calls and provides routine information concerning agency services according to established procedures.	Answers telephone calls and provides routine information concerning agency services according to established procedures.
Prepares standardized forms such as routing slips, receipts, etc. according to detailed procedures.	Prepares standardized forms such as routing slips, receipts, etc. according to detailed procedures.
Receives and distributes incoming mail, memoranda, packages, etc. to appropriate individuals within the assigned unit.	Receives and distributes incoming mail, memoranda, packages, etc. to appropriate individuals within the assigned unit.
Retrieves records from files such as correspondence, applications, claim record cards, etc.	Retrieves records from files such as correspondence, applications, claim record cards, etc.
Locates and withdraws information from records by using electronic data display terminals, searching files, etc. in order to respond to inquiries or requests by supervisors.	Locates and withdraws information from records by using electronic data display terminals, searching files, etc. in order to respond to inquiries or requests by supervisors.
Posts information to logs or records according to prescribed procedures.	Posts information to logs or records according to prescribed procedures.
Operates standard office machines and equipment requiring brief orientation prior to use such as photocopiers, stencil duplicators, spirit duplicators, file retrieval equipment, central console telephone systems, postage meters, microfilm or microfiche viewers or processors, calculators, adding machines, public address systems, paging devices, two-way radios, binders, hand collators, perforators, folders, shredders or similar equipment.	Operates standard office machines and equipment requiring brief orientation prior to use such as photocopiers, stencil duplicators, spirit duplicators, file retrieval equipment, central console telephone systems, postage meters, microfilm or microfiche viewers or processors, calculators, adding machines, public address systems, paging devices, two-way radios, binders, hand collators, perforators, folders, shredders or similar equipment.
Reviews forms, lists, documents correspondence and/or applications for accuracy and completeness.	Reviews forms, lists, documents correspondence and/or applications for accuracy and completeness.

(Stipulated Record, Exhibits 1 & 2)

12. The Classification Specifications for Typist II and Clerk II contain the following duties that distinguish them from the entry-level job (Typist I and Clerk I respectively)

<b>TYPIST II</b>	<b>CLERK II</b>
<b>INCUMBENTS OF POSITIONS AT THIS LEVEL OR HIGHER ALSO:</b>	
Type material such as contracts, legislative drafts, decisions, motions, briefs, court orders and other legal documents; medical reports such as operative notes, discharge summaries, histories, results of physical examinations, clinical notes and results of consultations; or technical or scientific manuals, manuscripts or statistical reports.	
Maintains records according to established procedures to ensure accurate and complete information.	Maintains records according to established procedures to ensure accurate and complete information.
Answer inquiries relative to laws, rules, regulations, policies and procedures governing agency services.	Answer inquiries relative to laws, rules, regulations, policies and procedures governing agency services.
Make calculations according to prescribed formulae for the purpose of processing documents such as invoices, payments, tax returns, etc.	Make calculations according to prescribed formulae for the purpose of processing documents such as invoices, payments, tax returns, etc.
Schedule or arrange for conferences, meetings, interviews, appointments or similar activities by reserving required facilities, checking the availability of parties involved and notifying appropriate individuals of dates, times and locations to ensure the availability of facilities and attendance by appropriate individuals.	Schedule or arrange for conferences, meetings, interviews, appointments or similar activities by reserving required facilities, checking the availability of parties involved and notifying appropriate individuals of dates, times and locations to ensure the availability of facilities and attendance by appropriate individuals.
Prepare requisitions according to standard procedures to replenish supplies.	Prepare requisitions according to standard procedures to replenish supplies.
Notify appropriate parties, orally and in writing, of information such as court decisions, trial consultations, patient arrivals and discharges, meetings and/or conferences, etc.	Notify appropriate parties, orally and in writing, of information such as court decisions, trial consultations, patient arrivals and discharges, meetings and/or conferences, etc.
Issue licenses, registration plates, certificates of title, permits or identification cards by checking applications for conformance with established guidelines, completing required forms and/or operating simple cameras and laminating devices to provide applicants with official documentation of licensure.	Based on assignment, incumbents of positions at this level or higher may also: 1. Issue licenses, registration plates, certificates of title, permits or identification cards by checking applications for conformance with established guidelines, accepting fees, completing required forms and/or operating simple cameras and laminating devices to provide applicants with official documentation of licensure
Based on assignment, incumbents of positions at this level may also: 1. Operate specialized office machines or equipment requiring training by manufacturers such as electronic data display terminals. 2. Transcribe dictation from dictaphones only.	

*(Stipulated Record, Exhibits 1 & 2)*



13. Both positions of Clerk I and Clerk II, as well as the Typist II position, are non-supervisory level official service jobs. (*Stipulated Record, Exhibits 1 & 2*)

14. Ms. Tomaspol has reinstatement rights under G.L.c.31,§39; she has reemployment rights under G.L.c.31,§40; and she has recall rights under Article 18.6 of the applicable Collective Bargaining Agreement . (*Stipulated Record, ¶12, ¶13 & ¶14*)

## CONCLUSION

### Summary of Conclusion

The Commission construes the statutory right of official service employees to bump other junior employees (in the event of a reduction in force due to lack of funds) to be defined more narrowly than in the case of labor service employees. There are clearly equitable arguments that the Appellant should be permitted to retain her position as a permanent civil service employee in the non-supervisory position of Typist II, over a more junior or provisional employee in either of the positions of Clerk II and Clerk I, both of lower pay grade and generally equivalent or less skilled non-supervisory job duties than a Typist II. The language of Section 39, however, expressly limits the “bumping” rights of official service employees to the “lower title or titles in succession”. In the Commission’s view, this language expresses a clear legislative intent to constrain “bumping” to official service titles within the same job “series”. If this requirement is to be changed, it is for the legislature to do so, or for HRD and collective bargaining units to negotiate the appropriate group classification changes that would accomplish the result sought by the Appellant in this case or other similar situations.

### Applicable Standard on Motion for Summary Disposition

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., whether or not “viewing the evidence in the light most favorable to the non-moving party” has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”; the opponent of summary disposition must produce sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd, 18 MCSR 216 (2005); cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

### Statutory Scheme

Section 39 of G.L.c.31 prescribes the procedures to be followed by an appointing authority in selecting permanent employees for layoff in a reduction in force due to lack of funds, as well as the procedures by which those employees must be reinstated to permanent employment. The first two paragraphs of Section 39 provide, as relevant to the “official service” positions involved in this appeal:

*If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of . . . lack of money . . . they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service. . . shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.*

. . . Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed. (emphasis added)

The term “title” is defined in G.L.c.31, §1 as “a descriptive name applied to a position or group of positions having similar duties and the same general level of responsibility”. G.L.c.31,§1 defines a “series” as “a vertical grouping of related titles so that they form a career ladder.”

#### Framework of the Dispute

The CSH justifies its refusal to allow Ms. Tomaspol to bump from her position of Typist II into a position of Clerk II or Clerk I based on its understanding of the “longstanding practice” of the Massachusetts Human Resources Division (HRD) to interpret the phrase “next lower title or titles in succession” in Section 39 to mean that “bumping” in lieu of termination is limited to a demotion to a lower title or titles “within the job series of the position being affected”, i.e., Section 39 entitles civil service employees to demote only into job titles bearing the same assigned name. (*Respondent’s Memorandum*, pp. 3-5) The CSH also asserts that Typists and Clerks are functionally separate and distinct jobs. (*Respondent’s Memorandum*, pp. 6-7)

Ms. Tomashpol disputes that there is any long-standing practice to restrict bumping to jobs with the same title. (*Appellant’s Memorandum*, pp. 2-5) She also argues, in effect, that, save for a difference in name and a substantially lower job (i.e. pay) grade, the jobs of Clerk I or II are functionally the same job as a Typist II, so that bumping to such



functionally equivalent titles squarely fits within the statutory scope of a lower level job “in succession” as described in Section 39. (*Appellant’s Memorandum*, pp. 5-8)

In the appeal of Almeida v. City of New Bedford, CSC Case No. G1-08-234, 22 MCSR --- (2009), the Commission recently considered a question similar to the question presented here. Almeida was a case in which an employee in the labor service was laid off from his position as a Bus Operator and claimed “bumping rights” to be demoted to lesser skilled labor service job(s) in different job title(s) that were held by more junior labor service employee(s). In Almedia, the labor service position of Bus Operator had only one title. In an earlier layoff of Bus Operators, the City of New Bedford had allowed them to “bump” into unskilled labor service jobs of Cafeteria Helpers until they were eventually reinstated as Bus Operators. In the most recent layoff, however, HRD informed the City that “bumping” outside of one’s job title was prohibited by civil service law, and the City refused to allow the Bus Drivers any bumping rights. On appeal to the Commission, a majority of the Commission agreed with the Appellant that Section 39 did not necessarily restrict bumping in the labor service to lower level jobs having the same job “title”, but permitted bumping into another position within the same occupational series (Motor Equipment Operating Series) for which the employee was equally or more qualified, or into a “unskilled” labor service job in a different job series.

The Almeida Decision, however, is not completely dispositive of this appeal. First, Section 39 uses different language when describing bumping rights in the labor service (“to the next lower title or titles in the labor service”) and in the official service (“to a position in the next lower title or titles *in succession* in the official service”) (*emphasis added*) The question, here, is what difference, if any, to make of that distinction.

Second, a brief review of the distinct statutory schemes for the hiring and retention of “labor service” and “official service” employees bears notice. In labor service, hiring and promotions are made entirely based on the order of seniority from rosters of qualified individuals; passing a civil service examination is not required to gain permanency in the labor service. G.L.c.31,§28-§30 In official service, however, the statute requires applicants be appointed to permanent civil service positions from “eligibility lists” on which candidates are placed, and should be hired, in rank order of relative merit based on scores achieved on job-specific competitive civil service examinations and certain statutory preferences (such as veteran’s status). G.L.c.31,§7-§27. Therefore, on paper, permanency, i.e. tenure, in an official service job is gained only after taking and placing high enough on a qualifying entry-level or promotional examination, as the case may be, to be selected for the position. Thus, unlike in Almedia, official service bumping to a different job title could, in theory, permit the anomaly of displacing employees who took and passed a competitive entry-level or promotional qualifying exam for their position by employees who did not take the exam or score high enough to win the job, initially.<sup>1</sup>

This theoretical concern becomes further muddled by the well-known fact that, save for public safety positions (fire, police, corrections), competitive civil service examinations are no longer given for state or municipal civil service jobs. In most cases, it has been decades since an examination was held for most positions. Thus, in the absence of such examinations, non-public safety civil service positions in the Commonwealth (and municipal civil service communities) must be filled “provisionally” under G.L.c.31,§12 or §15, meaning that the appointment is made on a “temporary”

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<sup>1</sup> The Stipulated Record does not indicate that Ms. Tomashpol ever had permanency in any Clerk Series position or passed an examination for those positions.

basis, “pending” the giving of an examination, a fiction that never actually occurs. Provisional employees have no civil service tenure and very limited rights under civil service law.

It has been long established that “[p]rovisional appointments or appointments . . . are permitted only in what are supposed to be exceptional instances. . .” City of Somerville v. Somerville Municipal Employees Ass’n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, the passage of decades without the personnel administrator holding competitive examinations for many civil service titles, and the professed lack of funding to do so any time in the near future, has meant that hiring and advancement of most civil service employees now must be accomplished by means of provisional promotions. Thus, as predicted, the exception has now swallowed the rule and “a promotion which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995). The fact that the Classification Specifications had been left largely unchanged since 1987, as this record shows, is but one of the symptoms of this malady.

The Commission and the courts have wrestled with the issues surrounding the so-called “plight of the provisional” and regularly exhort the civil service community of the corrosive effects of permitting the use of “provisional” appointments and promotions to become the rule, not the exception. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff’d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. See also Poe v. Department of Revenue, 22 MCSR 287 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009); Olufemi v. Department of Revenue, 22



MCSR 219 (2009); Keohe v. City of Boston, 21 MCSR 240 (2008); Asiaf v. Department of Cons. Rec., 21 MCSR 23 (2008); Rose v. Executive Office of HHS, 21 MCSR 23 (2008); Kasprzak v. Department of Revenue, 20 MCSR 628 (2007) [Kasprzak III]; Connelly v. Department of Social Services, 20 MCSR 366 (2007); Glazer v. Department of Revenue, 20 MCSR 51 (2007); Shea et al v. Department of Revenue, 19 MCSR 232 (2006) [Shea II]; Kasprzak v. Department of Revenue, 19 MCSR 34 (2006) [Kasprzak II]; Tanca v. Department of Empl. & Training, 9 MCSR 18 (1996); Veneau v. Department of Revenue, 8 MCSR 8 (1995); Felder v. Department of Public Welfare, 7 MCSR 28 (1994) [Felder II]; Barrett v. Department of Public Works, 6 MCSR 167 (1993); Felder v. Department of Public Welfare, 6 MCSR 67 (1993) [Felder I]. Little has been done (or questionably can be done in the near future) to wean the system from this practice. As a result there appears no end to the reality that the vast number – probably most –current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy.

#### The Past Practice of “Bumping”

As the Commission majority found in Almeida, the Appellant’s point is well-taken that there is no definitive administrative practice or HRD rule that clearly defines the meaning of the phrase in Section 39 purporting to limit bumping “to the next lower title of titles in succession in the official service”. See PAR.15 (Layoff from Civil Service Positions). A review of Commission decisions indicates that, in a few situations, bumping has been employed previously to a lower graded official service position of a different “title” both within and outside of the bumping employee’s occupational title. See Martin v. City of Boston Parks & Rec.Dep’t, 20 MCSR 234(2007) (Head Clerk to

Principal Clerk Typist); Shea, et al. v. Department of Revenue, 18 MCSR 235 (2005) (bumping from Tax Examiner I to Administrative Assistant series); Price v. Department of Empl. & Training, 10 MCSR 238 (1997) (Employment Security Supervisor II to Job Specialist II and Compliance Officer II) None of these decisions, however, specifically raised the issue presented here and it was not addressed in the Commission's decisions.

Expanded "bumping corridors" to enable laid off senior employees to displace junior employees in different job titles have been embodied in some collective bargaining agreements. See, e.g. Shea, et al. v. Department of Revenue, 18 MCSR 235 (2005); Price v. Department of Empl. & Training, 10 MCSR 238 (1997) See also, Union Contracts, [mass.gov/Ehrd/docs/emprel/cba](http://mass.gov/Ehrd/docs/emprel/cba) (collective bargaining agreements for civil service and/or non-civil service state agency employees, including, in some cases, specific provisions to bump into certain job titles and series for which the employee is "deemed qualified") Although not a definitive answer to the question, the use of collective bargaining agreements to implement a mutually acceptable bumping process suggests that such rules are clearly feasible and acceptable to appointing authorities and employees, as well as deemed consistent with what is allowable under civil service law.<sup>2</sup>

In sum, prior practice and Commission decisions give some support to the Appellant's position, but they do not provide the definitive answer.

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<sup>2</sup>These expansive bumping rights negotiated through collective bargaining agreements could become problematic if tenured employees under civil service were not entitled to the same benefits (i.e., allegedly more limited in bumping rights), lest it invite the anomalous result that non-civil service and provisional employees are allowed to bump other employees that tenured employees holding the same positions could not bump. See, e.g., City of Fall River v. AFSCME Council 93, Local 3177, 61 Mass.App.Ct. 404, 810 N.E.2d 1259 (2004) (discussing when provisions of collective bargaining are invalid as conflicting with civil service law); City of Leominster v. International B'h'd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 596 N.E.2d 1032, rev.den., 413 Mass. 1106, 600 N.E.2d 1000 (1992) (same).

### The Scope of Bumping in Official Service Layoffs

The issue, ultimately, a question of first impression, requires the Commission to interpret and apply applicable civil service law, particularly, the terms “title”, “series” and “in succession”, in G.L.c .31, §1 and §39.

The Appellant contends the legislature easily could have written language into Section 39 that limited bumping to job titles within a single “series” by expressly incorporating the definition of “series” in G.L.c .31, §1. (*Appellant’s Memorandum*, pp 2-3) While the legislature did not use the term “series” in G.L.c.31, §39, it does appear it intended something along those lines by adding the words “in succession” to modify the phrase “titles” to which an official service employee could be demoted under Section 39, language that was omitted from the ensuing phrase referring to Section 39 labor service demotions. G.L.c.31,§39, ¶2.

This Commission is obliged to give some meaning to the words “in succession”. Absent definitive judicial guidance, the Commission finds the statute intended that, in the official service, bumping be somewhat more restricted than in labor service and is confined to a vertical grouping of jobs within the employee’s “title” or “series”, consistent with the statutory meaning of those terms in G.L.c.31,§1.<sup>3</sup>

It remains for the Commission to determine, in this case, whether the “series” to which Ms. Tomashpol belongs is confined to the Typist job “title”, as CSH contends, or

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<sup>3</sup> “Bumping”, i.e., pre-layoff demotion, under G.L.c.31,§39,¶2, is distinguished from post-layoff “reinstatement” under G.L.c.31,§39,¶1. When it comes to reinstatement, the words “title” and “in succession” do not appear; rather the statute uses language that grants the right to be “*reinstated prior to the appointment of any other applicants to fill such positions [from which they were laid off] or similar positions*”. (*emphasis added*) See *Erricola v. Department of Env. Protection*, 18 MSCR 103 (2005) (Word Processing Operator II allowed to be reinstated to “similar” out of series of EDP Entry Operator III) cf. *Shea v. Civil Service Comm’n*, Suffolk No. SUCV2006-3525 (Sup.Ct. 2008) (noting HRD’s policy to limit placement on Section 40 “reemployment” lists to positions in which the employee once had permanency).



whether it also encompasses the Clerk job “titles” as well, as Ms. Tomashpol claims. CSH asserts that, because HRD created two different “Classification Specifications”, one called Clerk and one called Typist, ipso facto, Clerks and Typists are different “job groups” with distinct duties and the Commission has no authority to look beyond the assigned title name to find that they are part of a single statutory “title” or “series” for layoff purposes. (*Respondent’s Memorandum*, pp.6-7) Ms. Tomashpol counters that a functional test should be applied to the types of jobs that are included within an employee’s “title” and “series”, and that the determination does not turn solely on the name assigned by HRD to particular jobs but, rather, on the defined duties and level of responsibility of the jobs themselves.

HRD’s authority to “classify” civil service “titles” and “series” and denominate them as they deem appropriate for administrative and payroll purposes is not disputed. HRD “Classification Specifications”, however, are primarily administrative and personnel management tools that must conform to, rather than alter, the substantive statutory rights of employees under Chapter 31, in general, and Section 39, in particular.<sup>4</sup>

On any objective view of the undisputed facts, it appears clearly true that the three positions under consideration here could have properly been included within the same statutory “title” (a “group of positions having similar duties and the same general level of responsibility”) and “series” (“a vertical grouping of related titles so that they form a career ladder”).

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<sup>4</sup> CSH refers to G.L.c.31, §5(b) for HRD’s authority to classify jobs, but that statute actually pertains to municipal plans. The administrative authority for the classification and pay plan of the Commonwealth, applicable here, is G.L.c.31,§3(a) and G.L.c.30, §45. The general tenor is analogous – comparable jobs are to be grouped together for purposes of job descriptions and pay grade – the terms “classes” and “job groups” are contained in the latter statutes, but only civil service law refers to job “titles” and “series”. In fact, both the Clerk and Typist series occupy the same administratively established “Occupational Group 15” within the Commonwealth’s Chapter 30 classification and pay plan. (See Finding of Fact ¶8).

Put in its simplest terms, a Typist is a Clerk I or II, but with superior typing skills; vice-versa a Clerk I & II is a Typist, but with basic typing skills. There is no dispute that Ms. Tomashpol is qualified, perhaps overqualified, to perform those jobs; the Clerk II position is three pay grades below Typist II and Clerk I is five pay grades below, and that she clearly has more seniority over incumbents in the two positions she seeks permission to be demoted into. In addition, the Typist II position she occupies is the highest level position in her assigned “job series” and CSH no longer employs any Typist I. These facts strongly infer that, if competitive examinations had been offered, her “career ladder” for advancement to a higher level clerical or a supervisory position from her current title would have to mean a move to a different job series, Clerk III and above being an obviously applicable one. Absent such competitive examinations, however, as a practical matter, Ms. Tomashpol, in effect, has been frozen in time with her Typist II moniker, because any other position she might have aspired to (e.g., Clerk III) likely would have jeopardized her status as a tenured civil service employee, as she would only have been provisionally appointed to such a position. See Andrews v. Civil Service Comm’n, 446 Mass. 611 (2006); Shea v. Department of Revenue, 19 MCSR 232 (2006).

That said, the Commission must apply the civil service law as written and a “Typist” and “Clerk” are, in fact, different “titles” and are classified in different job “series”. The “title” of “Clerk II” simply cannot be reconciled, with any reasonable view of the statutory language, to be a lower “title” that is “in succession” to the “title” of “Typist II”. The Commission fully appreciates the equities that might favor a different approach that would permit Ms. Tomashpol to bump less senior, and, especially, provisional employees who hold functionally equivalent clerical jobs that happen to have been given different

titles or series names when all those job categories were established decades ago. The solution to the problem with the official service classification system that has been allowed to languish without substantial updating and competitive examinations for a long time is not, however, one that the Commission can confront on a case-by-case basis. Rather, those issues are for HRD and collective bargaining units to address. See generally G.L.c.30, §45-49; G.L.c.150E, §4.

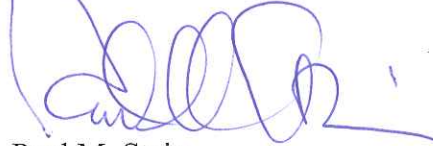
Finally, while the Commission cannot require it, it would seem wholly consistent with basic merit principles if the CSH were to act in its discretion, on its own initiative, and chose to displace (and reinstate) less senior and, especially, provisional employees in functionally “similar” positions, without regard to whether or not they fall strictly within the same “title” or “series” of jobs, so that it could retain the most senior and permanent civil service employees whenever possible. See generally, O'Donnell et al v. Registry of Motor Vehicles, CSC Case No. D1-09-236, 250, 22 MCSR --- (2009) (noting that RMV had broad discretion in making layoff decisions to act equitably to preserve jobs held by long-time career civil servants over less senior and provisional employees). By taking that alternative equitable course, CSH might avoid future civil service appeals and collective bargaining disputes over the kind of thorny issues presented in this appeal.

Until such time as it becomes feasible to update the civil service classification system and resume competitive examinations, the Commission urges CSH, as well as all appointing authorities, to give serious consideration to the equities of such an approach in future downsizing decision-making.



Two Commissioners (Henderson & Taylor) voted to allow the Appellant's Motion for Summary Decision and allow her appeal. Two Commissioners (Bowman & Stein) voted to allow the CSH Motion for Summary Disposition and deny the Appellant's appeal. As a result of the lack of a majority of the Commission voting to allow the appeal, for the reasons and to the extent stated above, the appeal of the Appellant, Lisa Tomashpol, is hereby *denied*.

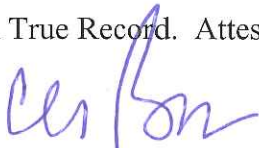
Civil Service Commission



Paul M. Stein  
Commissioner

By 2-2 vote of the Civil Service Commission (Bowman, Chairman [ALLOW CSH MOTION (TO DISMISS APPEAL)]; Stein [ALLOW CSH MOTION (TO DISMISS APPEAL)]; Henderson, Commissioner [ALLOW APPELLANT'S MOTION TO ALLOW APPEAL], & Taylor [ALLOW APPELLANT'S MOTION (TO ALLOW APPEAL)]; Marquis, Commissioner [absent]) on January 7, 2010

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. ~~A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.~~

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Michael F. Manning, Esq. (for Appellant)

John Marra, Esq. (for Appointing Authority)